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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 338

GRACE GROVE SAPPINGTON AND LILLIAN GROVE SHANK, INDIVIDUALLY AND AS CO-EXECUTRICES U/W OF JESSIE B. GROVE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRAYER FOR WRIT

Grace Grove Sappington and Lillian Grove Shank (the "Petitioners"), co-executrices under the will of Jessie B. Grove (the "decedent"), pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on April 15, 1969. That judgment ignored a decision of the highest court of Maryland, holding that decedent ". . . was given an estate for life . . ." in certain shares of stock in her deceased husband's estate and affirming a decision of the District Court for the District of Maryland which found that the decedent ". . . owned such shares outright and in fee after the administration of the estate was concluded . . ."

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court for Frederick County is unreported. It is printed at pages 1a-7a of the petition. The decision of the Maryland Court of Appeals is reported at 247 Md. 427, 231 A. 2d 712. The opinion of the District Court for the District of Maryland is reported in 21 AFTR 2d, 1619 and is printed at pages 7a-18a of the petition. The decision of the Circuit Court of Appeals for the Fourth Circuit, as corrected after the petition for rehearing *en banc* was filed, is unreported as of the date of this petition and is printed at pages 19a-24a of the petition. The opinion of the Circuit Court of Appeals denying the petition for rehearing is printed at pages 24a-25a of the petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on April 15, 1969. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Did the District Court, in the application of a federal tax statute, err in ignoring the decision of the highest court of the State of Maryland as to the nature of the property interest received by the decedent from the estate of her deceased husband?

STATUTES INVOLVED

The Internal Revenue Code of 1954

Title 26 U.S.C., Sec. 2033

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Title 26 U.S.C., Sec. 2035

(a) *General Rule* — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule* — If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

STATEMENT OF THE CASE

The Petitioners brought an action against the United States in the United States District Court for the District of Maryland to recover federal estate taxes assessed and collected from the decedent's estate in the amount of $122,583.75, with interest. The United States filed a counterclaim in the amount of the Maryland estate taxes, allowable to the extent paid, as a credit against the federal estate tax, in the amount of $12,198.76.

A timely estate tax return was filed with the District Director of Internal Revenue, in Baltimore, on or about

July 8, 1963, at which time federal estate tax in the amount of $118,072.55 was paid. Upon audit, an additional assessment was made in the amount of $4,511.20, which was paid, with interest, on or about August 9, 1965. Concurrently with the last payment a timely claim for refund was filed with the District Director at Baltimore, Maryland. No action having been taken on the claim within six months, a complaint was filed by the Petitioners in the United States District Court for the District of Maryland on April 4, 1966. The claim was disallowed in full on April 22, 1966.

In January 1966, the trustee appointed under decedent's will filed a bill for construction of the will of Eugene A. Grove, the decedent's husband, in the Circuit Court for Frederick County, Maryland, naming therein the Petitioners as defendants. The trustee was concerned because the federal estate tax had not been pro-rated between jointly-held and solely-owned property of the decedent, and all of the solely-owned property to which the trust should have attached had been exhausted in payment of the estate tax. The lower court determined that under the language of the will of Eugene A. Grove, the decedent had received a life estate in her late husband's property and the remainder interest vested in Eugene A. Grove's four daughters, not upon the death of the life tenant as contended by the Petitioners, but upon the earlier death of her husband in 1929. Accordingly, the decedent, as the heir at law of two of her daughters, both of whom predeceased her and died intestate and unmarried, possessed an absolute interest in those shares which constituted the remainder interests of the two deceased daughters. The remainder interests of the two surviving daughters, however, passed to them directly through their father's will. The Petitioners appealed the decision to the Maryland Court of Appeals,

which sustained the decree of the lower court in an opinion reported at 247 Md. 427, 231 A. 2d 712.

The Petitioners, in order to determine the effect of that decision on their right to a refund, traced all the transfers of shares originally held by Eugene A. Grove, which shares had increased in number as a result of stock splits, stock dividends, rights to subscribe, and an acquisition of the Grove Lime Co. by the Flintkote Company. They discovered that the decedent had carefully divided all the stock she received from her husband's estate into four equal lots and registered each lot separately in the name of herself and a different daughter for each lot; that she never sold or otherwise disposed of any stock; and that various gifts of stock which she made in 1960 consisted exclusively of shares she inherited from a deceased daughter, a course of conduct consistent with previous transfers made following the death of her first daughter in 1946. Accordingly, the estate filed a motion to amend the pleadings in order to exclude those shares from the decedent's estate on the basis that no gift in contemplation of death was made. This motion was denied, and the denial was sustained by the Circuit Court of Appeals for the Fourth Circuit.

Thereafter, on January 8, 1968, the cause was heard on its merits, and the District Court delivered an oral opinion on February 19, 1968, which held that the decedent did not take any shares of stock under her husband's will, but had purchased all the shares from his estate and that all such shares were includible in the decedent's estate under Section 2033. An order dismissing the complaint with prejudice was entered on May 2, 1968, from which the estate filed a timely appeal to the Circuit Court of Appeals for the Fourth Circuit.

The case was argued in the Circuit Court of Appeals for the Fourth Circuit on December 4, 1968. A decision was entered on March 3, 1969, affirming the decision of the District Court. Thereafter, the Petitioners filed a timely petition for re-hearing *en banc*. Prior to filing its opinion denying the motion for re-hearing *en banc* on April 15, 1969, the Circuit Court of Appeals substantially rewrote its opinion to correct a number of serious, factual errors.

REASONS FOR GRANTING THE WRIT

In *Commissioner v. Estate of Bosch*, 387 U.S. 456, this Court held that if there be no decision of a state's highest court, "then federal authority must apply what it finds to be the state law after giving 'proper regard' to relevant rulings of other courts of the state." In reaching this result, it was observed that "under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling." The issue presented by the Petitioners is whether, under the same or some other conditions, federal authority may also ignore a decision of the highest court of a state.

The District Court justified its departure from the rule enunciated by this Court in *Commissioner v. Estate of Bosch, supra*, by observing that there had been no factual determination by the state courts because the case was submitted on bill and answer. There was no suggestion, however, that the controversy was not *bona fide* or that fraud or collusion were present.

The question before the state courts was the interpretation of the will, and whether decedent had a life estate, or a defeasible fee, in the shares of stock she received from her husband's estate; and if the former, whether the interest in remainder vested in 1929 or 1962. The Maryland

courts held that her interest was a life interest which would be reduced to a fee in a third of the estate upon remarriage and that the remainder vested in 1929. That determination would have been the end of the matter but for the collateral attack made upon that decision in the District Court.[1]

At a hearing on a motion for summary judgment, after the Circuit Court for Frederick County had reached its decision, the United States raised, for the first time, the suggestion that the will construction suit was immaterial because the decedent had purchased the assets of her husband's estate and through this device, rendered her husband's will a nullity.

The illegality and complete impropriety of the "sale" upon which the United States relies and which the District Court approved was so clear under Maryland law, however, that the point had neither occurred to the parties in the state courts nor the judge who heard the case in the Circuit Court for Frederick County, nor the judges on the Maryland Court of Appeals. The Circuit Court of Appeals for the Fourth Circuit, however, dismissed the Petitioners' objections to this curious disregard of Maryland law by stating that "even if an executor's purchase is voidable, the short answer is that no Maryland case has ever decided such a sale invalid, if, as here, not com-

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[1] The record in the District Court reflects that the District Director was notified on March 14, 1966 (Exhibit 14A) that the will construction suit was being filed, and he was invited to participate in the case. Following the decision of the Circuit Court for Frederick County, the United States Attorney handling the refund suit was notified of the decision and the pending appeal (Exhibit 14B). Various information was requested by him (Exhibit 14C) and supplied by Petitioners' counsel (Exhibit 14D), but the United States sat idly by.

plained of for almost 40 years".[2] Conversely, however, no Maryland court has ever sustained such a sale! The startling impact of the Circuit Court of Appeals' decision is magnified by the fact that the interest of the decedent in the assets of her husband's estate was subject to an additional limitation in the event of her remarriage and the question of the respective remainder interests of the daughters could not even be questioned until their mother died without remarrying, an event which did not occur until 1962!

The gross inequity of the result reached by the District Court is demonstrated by an analysis of the case. The decedent's husband died in 1929 and left in his estate, among other things, 114 shares of stock in the Grove Lime Co. valued at $22,800, which for all practical purposes are the only subject matter of this litigation. The debts and expenses of administration amounted to $14,494.48. The assets were valued at a total of $28,371.30. To pay the debts, the decedent sold 20 shares of the Grove Lime Co. stock to her brother-in-law at an amount greatly in excess of the inventory value and obtained enough money for the shares sold to pay all the debts of the estate. The Petitioners contend that the decision of the highest court of the State of Maryland requires that the life estate attach, under the husband's will, to the 94 shares retained by the widow, who was the executrix of her husband's estate. This result must follow, for to hold any other way would put the stamp of judicial approval upon the widow's defeating the life estate and a condition over in the event of her remarriage, through the simple expedient of a bookkeeping entry in the administration account.

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[2] It is interesting to note that in an analogous situation, the Maryland courts have set aside illegal sales as much as 17 years after the fact. *Marbury v. Ehlen*, 72 Md. 206, 19 A. 648.

The Maryland courts have steadfastly taken the position that an executor may not purchase assets from an estate, and in the isolated circumstances where such sales have occurred, they are voidable. *Maryland Fire Insurance Co. v. Dalrymple,* 25 Md. 242; *Sessions v. Casey,* 141 Md. 312, 118 A. 759; *Schockett v. Tublin,* 170 Md. 117, 183 A. 521; *Turk v. Grossman,* 176 Md. 644, 6 A. 2d 639; and *Harlan v. Lee,* 174 Md. 579, 199 A. 2d 862. This rule applies with even greater force when the action of the executrix appropriates the entire estate to her own use, and in so doing, defeats a life estate under her husband's will and a condition which reduces her interest in the estate to a statutory third in the event of remarriage. The United States District Court and the Circuit Court of Appeals for the Fourth Circuit ignored this point, and it was only after the Petitioners filed a petition for re-hearing *en banc* that the Circuit Court of Appeals for the Fourth Circuit felt constrained to issue another short opinion, belatedly recognizing the point, but saying that, in effect, the Petitioners had waited 40 years too long to raise it.

In the same opinion, the Circuit Court of Appeals stated that the life tenant's action was inconsistent with "the limited estate the plaintiffs assert." The surviving daughters always understood, as their undisputed testimony plainly indicated, that they had a remainder interest in the stock after their mother's death, and they had no reason to raise the point until after her death, when the United States disputed their chain of title in the District Court. Further, the Circuit Court of Appeals, in stating that the decedent's actions were inconsistent with the life estate, ignored the undisputed, stipulated facts that the decedent never sold a single share of the stock and that the gifts made by the decedent to which the court alludes by its reference to "inconsistent action" were made only from shares she

inherited from her two daughters who predeceased her, intestate and unmarried. As to those shares, as their heir, she took their remainder interests, and the Petitioners are obviously bound by the decision of the Maryland Court of Appeals and have not since contended that the life estate attached to any of those shares.

It is readily apparent that the lower federal courts have not only ignored what should be a controlling decision by the highest court of the State of Maryland relating to this very estate, but in so doing, have pushed aside probate law and practice which has been settled for over 100 years in Maryland. In reaching this anomalous result, the lower federal courts disregarded certified docket entries made 40 years ago in the Orphans' Court of Frederick County which voided absolutely the so-called "sale" made by the executrix; ignored a decision of the Maryland Court of Appeals as to the nature of the decedent's interest in her husband's estate; refused to apply Maryland law which would void the sale of securities on the basis that more shares were sold than was necessary in order to pay the debts of the estate; ignored the fact that the securities were sold for an inadequate consideration; ignored the fact that the sale was not carried out in conformity with established Maryland practice; ignored the ineligibility of the decedent as a purchaser of the securities under Maryland law; and ignored the fact that the decedent illegally profited from the sale of securities to the extent that the 20 shares of stock she sold to pay the debts were "acquired" by her at $200 per share and immediately sold for $6,950. In short, to permit the sale to stand constitutes a fraud upon the estate of which the United States is the sole beneficiary.

The decision of the highest court of the State of Maryland must be followed by the federal courts. Nowhere in

the decisions of the lower federal courts was there any suggestion that the decision of the Maryland Court of Appeals was obtained by fraud or collusion. A genuine controversy existed which required a decision as to the nature of the estate the decedent received from her husband. Not only was there absence of collusion, but the Petitioners vigorously disputed the decision of the Circuit Court of Frederick County and appealed to the Court of Appeals of Maryland in an effort to have that decision reversed.

The Petitioners have been unable to discover any other case decided since *Bosch*, in which a decision of the highest court of a state was disregarded. In every case where a decision of the highest court of a state was involved, the courts have consistently construed *Bosch* to require that the decision be followed. See *Henley v. U. S.*, 396 F. 2d 956 (Ct. of Cls., 1968); *Harry C. Porter*, 49 TC 207. The decision of the Circuit Court of Appeals affirming the decision of the District Court for the District of Maryland in this case stands as an anomaly in the reported decisions.

The District Court sought to justify its disregard of the decision of the Maryland Court of Appeals on the basis that the Maryland Court of Appeals had not decided the issue raised by the United States in the District Court. The decision of the Maryland Court of Appeals, having decided the property interest that the decedent received from her deceased husband's estate and having decided the overriding issue in the case, could not and should not be expected to decide every possible collateral issue that might have been raised by the parties or that might subsequently be raised by someone seeking to avoid the effect of the decision. As this Court observed thirty years ago, "[o]ne trial of an issue is enough." *Treinis v. Sunshine Mining Co.*, 308 U.S. 66, 60 S. Ct. 44, 84 L. Ed. 85 (1939).

CONCLUSION

For these reasons, we pray that the petition be granted and that a writ of certiorari be directed to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

EDWARD L. BLANTON, JR.,
Counsel for Petitioners.

APPENDIX

MEMORANDUM OPINION AND ORDER OF COURT

Circuit Court of Frederick County

(Filed September 6, 1966)

In this equity proceeding, the Complainant, R. Frances Sappington, Trustee under the Will of Jessie B. Grove, filed a Bill of Complaint for the construction of the Last Will and Testament of Eugene A. Grove, her husband. The Will in question was dated May 1, 1928, the Testator died on October 17, 1929, and the Will was admitted to probate in the Orphans' Court of Frederick County on October 28, 1929. The Will provides as follows:

> "Being of sound mind, I hereby make my Last Will and Testament as follows:
>
> "To my wife, Jessie B. Grove, I leave everything I may possess as long as she remains my widow. Should she decide to marry I allow her what is due according to law. The balance I leave to my children [to sic] share and share alike.
>
> "I appoint my wife, Jessie B. Grove my Executrix, without bond."

The widow, Jessie B. Grove, qualified as Executrix pursuant to the Will, and filed an inventory in the Orphans' Court which reported, together with other assets, 114 shares of stock in the M. J. Grove Lime Company, then valued at $22,800. The estate was distributed, including these shares, in the final administration account "to Jessie B. Grove, widow for and during her life or widowhood, the whole balance."

At the time of Eugene A. Grove's death, he was survived by his wife and four daughters, two of whom died intestate and unmarried prior to the death of Jessie B. Grove, their mother. Jessie had not remarried when she died in 1962,

and before her death, the stock she received from her husband in the M. J. Grove Lime Company had increased by stock splits, stock dividends and an acquisition of the corporation by The Flintkote Company, to a considerable fortune. Apparently in an effort to give effect to the estate for widowhood she received from her husband, Jessie caused the stock certificates she received from the Grove and Flintkote companies to be registered in her name and that of her four daughters as joint tenants and occasionally, as tenants by the entireties. Upon the death of her daughter Mary Louise Grove in 1946, the shares then registered in the name of Jessie B. Grove and Mary Louise Grove were divided, again in joint tenancy, with the three remaining daughters. When Rebecca Clagett Grove died in 1960, her stock was transferred by Jessie B. Grove equally to her two surviving daughters and their families.

The Federal Estate Tax return filed by the Respondents, the Co-Executrices of the Estate of Jessie B. Grove, included the gift of Rebecca Grove's stock to Jessie's two surviving daughters in her taxable estate. In addition, all the stock then held jointly by Jessie B. Grove and her two surviving daughters was included in the estate for Federal tax purposes. The inclusion of the gifts and jointly-owned stock produced a gross estate of $567,612.01 and a Federal estate tax of $144,314.71. This amount greatly exceeded the property in Jessie Grove's probate estate, all of which was used to pay the estate taxes. The Complainant contends that Maryland law, Section 162, of Article 81, requires the pro-ration of any estate tax liability between the solely-owned and "jointly-owned" property. I agree with Complainant's contention that such is the effect of the statute.

The Respondents contend, however, that the jointly-owned property was not properly includible in their mother's estate and that their mother had no more than a life estate in the property received from their father. Further, they contend that they were improperly advised to include the stock in the Federal estate tax return, that they have filed suit to have all the taxes paid on the estate refunded, and that they have been advised not to pay any

amount to the Complainant as Trustee under their mother's Will until the nature of the estate their mother received from their father was determined by a Court of competent jurisdiction. The case was submitted upon Bill and Answer and a hearing was held at which both parties were represented by counsel, and following the hearing, Memoranda were submitted on behalf of the Complainant and Respondents.

Complainant contends that the language in the Will of Eugene A. Grove gave his wife no more than a life estate in the whole of his property, which would be reduced to a fee in a third of her property in the event she remarried, that the remainder "to my children share and share alike" created a class gift, and that the remainder did not vest in the children of Eugene A. Grove until the death of the life tenant. The effect of this contention would be to eliminate from Jessie B. Grove's taxable estate any property that could be traced from the estate of her husband, reducing the estate tax liability substantially or eliminating it altogether, thereby maximizing the amount that should be paid by the Respondents to the Complainant as Trustee under the Will of Jessie B. Grove.

Complainant further requested that an Order be directed to the Orphans' Court of Frederick County to apportion the estate taxes consistent with the opinion deciding the underlying property rights of the parties hereto in the Estate of Jessie B. Grove.

The first contention is that Jessie B. Grove had no more than a life estate in the property that she received from her husband. She received the estate only for her widowhood and no longer. Upon her death, the entire estate was to go to the Testator's children. Upon her remarriage, she was to have her third, and the remaining two-thirds would go to the children. The distinction between estates on condition and limitation of an estate was expressed by our Court of Appeals in *Brown v. Hobbs*, 132 Md. 559, at 562 ff. as follows:

> "While some writers speak of determinable fees as including fees upon *condition*, we think this argument

of the appellants, strictly speaking, loses sight of the technical distinction between a *condition* and what is spoken of in the text books as a *limitation*. Mr. Venable, in his Syllabus (1st Ed.), p. 117, says the term *limitation* ordinarily means the conveyance of an estate, or the language which defines the character of the estate conveyed. * * * But in a less usual sense, a *limitation* is an estate which extends to some certain or uncertain event; e.g., an estate to A. until she marries; an estate to B. and his heirs *so long as* he, or they, continue to dwell on the premises. Limitations, therefore, include all estates for a term of years, their duration being fixed; determinable (base or qualified) fees; and that class of life estates which are to endure until the happening of some event, but may endure for a life: e.g., an estate during widowhood. A limitation marks the period of the estate's duration by some certain or uncertain event. It is created by such words as *until, as long as, during, whilst*, etc. In the case of a limitation the estate runs out its existence to a predetermined boundary. A condition designates some event which may cut short the estate before it reaches its termination. It is created by such words as *on condition, provided, so that*, etc."

There are a multitude of other cases, in this and other jurisdictions, which hold that an estate for widowhood is a life estate. *Swope v. Swope*, 5 Gill 161; *Hammett v. Hammett*, 43 Md. 307; *Maddox v. Yoe*, 121 Md. 288; *Perin v. Perin*, 139 Md. 281; *Rausch v. Rausch*, 64 N.Y. St. Rep. 490, 31 N.Y. Supp. 786; Matter of *Schrivers Estate*, 221 N.Y. 268, 116 N.E. 995; In re *Clickman Will*, 116 Misc. 540, 190 N.Y. Supp. 762; *Mulberry v. Mulberry*, 50 Ill. 67; *Rose v. Hale*, 185 Ill. 378; *Sayer v. Humphrey*, 216 Ill. 426; *Cowman v. Glos*, 255 Ill. 377; *Koonz v. Hempy*, 142 Iowa 337; *Brunk v. Brunk*, 157 Iowa 51; *Mansfield v. Mansfield*, 75 Me. 509; *Knight v. Mahoney*, 152 Mass. 523; *Fuller v. Wilbur*, 170 Mass. 506; *Peck v. Griffis*, 148 Mich. 682; In re *Brooks Will*, 125 N.C. 136; *Sink v. Sink*, 150 N.C. 444; *Cooper v. Pogue*, 92 Pa. 254; *Hibbits v. Jack*, 97 Ind. 570.

In *Perin v. Perin*, supra, the Court of Appeals held:

> "The devise in remainder is not expressly confined to the contingency of Mrs. Perin's remarriage, but even if it had been it may now be regarded as settled in this State that a devise to a widow so long as she remains unmarried, without a limitation over in case of her remarriage, but without any reference to her death, vests in her a life estate, subject to be defeated by her marriage, and that the remainders take effect upon the termination of the life estate by marriage or death. *Maddox v. Yoe*, 121 Md. 288; *Ijams v. Schapiro*, 138 Md. 16. Upon the same principle it is held that, where an estate is given to a widow during her widowhood, with a limitation over upon her death, the remainder will take effect upon the termination of her estate by remarriage. *Clark v. Tennison*, 33 Md. 85; *Boyd v. Sachs*, 78 Md. 491; *Davis v. Hilliard*, 129 Md. 348."

Applying these cases to the language now before the Court, I agree with Complainant's contention that Jessie B. Grove received a life estate in the whole of her husband's property which would be reduced, in the event she remarried, to a fee in a third of his estate. Jessie B. Grove did not remarry, and upon her death, the remainder passed to the children of Eugene A. Grove pursuant to his Will.

Complainant's second contention is that the gift over to the children of the Testator was a class gift which did not vest until the termination of life estate. Alternatively, he contends that in the event the gift vested upon the death of the Testator, the children took as joint tenants and that the two daughters who survived Jessie B. Grove took their estate as a result of the joint tenancy so created rather than from the joint interest supposedly created by Jessie B. Grove.

As authority for the former proposition, Complainant relies upon *Stahl v. Emery*, 147 Md. 123 and *Straus v. Rost*, 67 Md. 465. The essential difference between the Will in the *Emery* case and the one at bar is that the Testator in

Emery clearly provided that his estate was to be divided "from and immediately after" the death or remarriage of his widow. Language indicating a similar intent, i.e., that the division was to take place "immediately upon her second marriage" or "upon her death" appears in the Will in the *Straus* case. I have reviewed the Will of Eugene A. Grove carefully, and I am unable to discover any language indicating that the division is to be deferred until the death or remarriage of the life tenant. In the absence of any language in the Will of Eugene A. Grove, indicating an intent to defer the division until the death or remarriage of his widow, I am inclined to believe that the remainder vested in the children of Eugene A. Grove living on the date of his death.

As to complainant's contention that a gift to a class creates a joint tenancy among the members of the class, I think that proposition, however correct it may have been at common law (see e.g. Miller *Construction of Wills in Maryland*, p. 192) has been superseded by Section 9, Article 50 of the Annotated Code of Maryland. This section clearly provides that no devise would create a joint tenancy unless "expressly provided" in the instrument. No such express language appears in the instrument, and I am of the opinion that no joint tenancy was created. Therefore, Jessie B. Grove was the only heir-at-law of her two deceased daughters, and their remainder interests passed to her upon their death.

To the extent Jessie B. Grove made valid gifts more than three years prior to her death, such stock is not includible in Jessie B. Grove's estate and pro-ration of the estate taxes against the recipients of those gifts will not be required by Section 162 of Article 81. Further, no part of the estate tax is to be prorated against that half of the "jointly-owned" property in which Jessie B. Grove had no more than a life estate and which passed, pursuant to the Will of Eugene A. Grove, to her two surviving daughters, the Respondents herein. The remaining jointly-owned property in Jessie B. Grove's estate, consisting of the "jointly-owned" stock she inherited from her two deceased

daughters (other than the shares she gave away more than three years prior to her death) is assessable for its pro-rata share of the Federal estate taxes.

The Court will sign a decree consistent with the foregoing opinion, directing the Orphans' Court of Frederick County as to the construction of the aforesaid Will and the manner of pro-ration of the estate taxes between the jointly-owned and solely-owned property of the Testatrix, Jessie B. Grove.

PATRICK M. SCHNAUFFER,
Judge.

RULING OF THE DISTRICT COURT

February 19, 1968

In this action, the plaintiffs are the Co-Executrices under the will of their mother, Jessie B. Grove, who died on April the 8th, 1962, a resident of Frederick County, Maryland. This decedent left a will dated March 8, 1962, which was admitted to probate in the Orphans' Court of Frederick County. A Federal Estate Tax return was duly filed and paid. Thereafter, the plaintiffs filed a claim for refund followed by this suit, claiming some $122,000 in overpayment of Federal Estate taxes, together with interest.

The principal question in this action is whether the decedent, Jessie B. Grove, was the owner in fee of certain shares of stock of the Flintkote Company, or whether at the time of her death she had no more than a legal life estate in such stock, with the result that the value of these shares should be excluded from her Federal Estate Tax return. If such decedent at the time of her death owned these shares of stock outright, all of such stock is includable in her estate for Federal Estate Tax purposes. On the other hand, if she merely possessed a life estate in such stock at the time of her death, other questions arise in this case, and it will then be necessary to trace and identify all of the shares involved to determine if they all fall into this category.

What is now Flintkote Company stock was formerly stock in a family concern, the M. J. Grove Lime Company. When the decedent's husband died in 1929, he owned 114 shares of common stock in that company valued then at $22,800. As a result of stock splits, stock dividends and the takeover by Flintkote, a substantial sum is now involved, representing the value of this stock.

Testimony has been heard in open Court on a previous hearing date. The Court has had an opportunity to study the various exhibits and also the extensive memoranda filed on behalf of both parties. Final argument has been heard today.

It appears that Eugene A. Grove, the husband of the decedent in this case, died on October 17, 1929. At the time of his death, he was survived by his wife, Jessie and by four daughters, Rebecca Clagett, Mary Louise, Grace and Lillian. Grace and Lillian, whose married names are Grace Sappington and Lillian Shank, are the plaintiffs in this action. Rebecca and Mary Louise are now deceased and in fact died before their mother. The will of Eugene A. Grove was a short one and provided as follows:

"May 1st, 1928.

"Being of sound mind I hereby make my last will and testament as follows.

"To my wife Jessie B. Grove I leave every-thing I may posses as long as she remains my widow. Should she decide to marry I allow her what is due according to law. The balance I leave to my children share and share alike.

"I appoint my wife Jessie B. Grove my executrix with-out bond.

"Very truly,

"EUGENE H. GROVE."

Eugene's brother, William J. Grove, was President of the M. J. Grove Lime Company, a family business, and

Eugene worked for this company. When Eugene died, 114 shares of common stock in the company owned by him and appraised at $22,800, were included in his estate. The first and critical question before this Court is whether these shares were purchased by his widow from the estate during its administration, or whether she received them by way of distribution under her husband's will.

If she received them by way of distribution under the will, it is clear that the original shares (and any derived therefrom) were not includable in the widow's estate when she died in 1962. In Shank v. Sappington, 247 Md. 427, which was decided on July 12, 1967, and which involved this very same family, the Court of Appeals of Maryland held that under Eugene's will his widow received a life estate in property distributed to her thereunder. It must be determined here, however, whether cash was distributed to the widow representing the proceeds of the sale of stock, less certain deductions for payment of expenses and debts, or whether in fact the shares of stock themselves were actually distributed. To decide this question, it is necessary in this case to examine and interpret the papers filed with the Register of Wills for Frederick County in 1929 and 1930 during the administration of the estate of Eugene A. Grove.

When her father died in 1929, Grace Grove Sappington, one of the plaintiffs here, was 24 years of age and was working in Philadelphia. Her sister, Lillian, the other plaintiff, was 21. Grace returned to Frederick on the death of her father and was employed thereafter at the company as an Assistant Secretary. Mr. D. P. Buckey, an attorney and long standing friend of the family, handled her father's estate. Docket entries in the Office of the Register of Wills for Frederick County for the Estate of Eugene A. Grove, which is No. 520, show the following with reference to the administration of this estate (and I am not going to read all of the entries from the docket but only those starting with October 6th, the dates being all in 1930, or at least the ones that I shall read there being other dates in the docket which are recorded in 1929). Quote:

		"Liber	No.	Folio
Oct. 6	Inv. S & Bonds	C.H.B.	2	217
9	Order to Sell S&B	A.M.P.	1	287
9	Certif. N. Cred.	R.E.L.	1	436
9	1st & final acct. filed	C.E.M.	1	105
7	Inv. Debts Due	C.H.B.	2	238
7	Sale S & Bonds	C.H.B.	1	110"

It should be noted that the last two papers are not entered in chronological order. In particular, the final paper, which is designated on the docket, "Sale S & Bonds," (but which is actually entitled, when one looks at the paper itself, "Report of Sales of the Stocks and Bonds of Eugene A. Grove") is the subject of conflicting interpretations by the parties in this action. The Government argues that such Report of Sale clearly indicates that Jessie B. Grove purchased 114 shares of the M. J. Grove Lime Company from the estate at the inventory price of $22,800 during administration of the estate. The plaintiffs contend that although this paper was executed and filed, the transaction was never carried out and the widow received such shares of stock by way of distribution rather than by way of purchase from the estate. As shown by the docket entries, an order authorizing the sale of stocks and bonds, including these 114 shares, was entered on October 9, 1930 by the Orphans' Court of Frederick County, Maryland. The Government refers to this order as further proof that a sale of this stock was in fact consummated. The plaintiffs on the other hand claim that this paper is no more than authority for transfer of the stock and is not inconsistent with a finding that the widow took the stock by way of distribution.

Analysis of the first and final administration account, which was likewise filed on October the 9th, 1930, discloses total assets in the estate of $28,371.30 and debts and expenses of $14,494.48, leaving $13,876.82 for distribution to the widow. Whether such distribution was in cash or by way of stock of the company, is a subject of dispute by the parties to this action.

After considering all the evidence in this case, including the exhibits, it is the opinion of this Court that Jessie B. Grove in fact purchased from her husband's estate 114 shares of M. J. Grove Lime Company at the inventory value of $22,800. Such purchase was necessary to provide the estate with cash to pay the debts owed by Jessie's husband at the time of his death and to pay administration expenses. There was clearly not sufficient cash to pay the estate debts and expenses and the only way that cash could be raised was by selling the stocks and bonds. By selling the stock of this particular company to the widow, the stock would be kept in the family and the debts and expenses could still be paid. It may well be, as testified by the plaintiff Grace Grove Sappington, that it was her father's original intention to leave the company stock to the mother for life with remainders in the four daughters. However, in view of the need of the estate for cash at the time of the administration, such design could not be fully carried out by the father's personal representative. Instead, arrangements were made for the stock to be owned by the widow outright with cash being supplied to the estate through such a plan for payment of the husband's debts.

The papers on file in the office of the Register of Wills of Frederick County, Maryland, support this conclusion. These papers are in evidence in this case and have been studied by the Court. An order authorizing the sale to Jessie B. Grove was entered by the Orphans' Court. This order recites that on application "in person of Jessie B. Grove, Executrix of Eugene A. Grove, late of Frederick County, deceased, for authority to sell and transfer the stocks and bonds named in the inventory * * *", it is "ordered that Jessie B. Grove, Executrix of Eugene A. Grove, late of said county, deceased, sell and transfer by proper modes of transfer to Jessie B. Grove * * * 114 shares M. J. Grove Lime Company * * *". The order further provides "that the said Executrix make report of her proceedings and sales under this order to this Court." A report of sale was in fact filed in which the Executrix stated that "she sold all of the stocks and bonds of said deceased, as per

order of the Orphans' Court." The purchaser was listed as "Jessie B. Grove" and included in the list of such stocks and bonds are 114 shares of M. J. Grove Lime Company, valued at $22,800. Although the filing date shown on the back of such report of sales is October 7, 1930, the date of the affidavit of the executrix to such report of sales is October 9th. Close examination of the paper indicates that originally this latter date was also October 7th but was changed to October 9th. The Court notes similar changes in the dates from October 7 to October 9 by writing the 9 over the 7 in the following papers:

The Administration Account, which is Stipulation Exhibit 2 j; the Certificate of Notice to Creditors, which is Stipulation Exhibit 2 i where this writing of 9 over the 7 occurs in 2 different places. And, as I previously mentioned, the Oath to the Administration Account.

This Court finds as a fact that the Report of Sale was actually filed on October 9, 1930 even though it may have been originally dated October 7, 1930. In fact, it appears that all these pertinent papers, the order authorizing the sale, the report of sale and the first and final administration account were filed the same day, October the 9th and that the docket entry is incorrect in showing that the report of sale was filed on October 7, 1929. The affidavit to this paper, as previously noted, was not taken until the 9th and therefore it could not have been filed until that latter date. Furthermore, the chronological order of entry on the docket itself would indicate that the date of filing of the report of sale was actually the 9th.

Distribution under the administration account was as follows:

> "Distribution according to will of testator to Jessie B. Grove, widow, for and during her life or widowhood the whole balance Per. Prop. & cash — $13,876.82".

Above the words "Per. Prop." is the figure "$541.00." An inventory of personal property was filed on April 14, 1930 showing personal property in the estate of $541.00 (includ-

ing chickens, sheep, a corn grinder and two automobiles.) Clearly a distribution to the widow from the estate consisted of tangible personal property in kind in the amount of $541.00, and cash in the amount of $13,335.82, for a total distribution of $13,876.82. The stock in question was not distributed to the widow in kind, as it had been sold to the widow for cash needed for debts and expenses.

The record of the administration of the husband's estate in the Orphans' Court of Frederick County, Maryland, therefore, clearly establishes the following as to the stock in question:

(1) The stock was included in an inventory filed in the estate.

(2) An order authorizing the sale of the stock to the widow individually was passed by the Court.

(3) A report of the sale was filed showing that the stock had been sold to the widow individually as authorized by the Court.

(4) The administration account indicates that cash and not stock was distributed to the widow, as well as tangible personal property in kind.

Further proof of the fact that Jessie B. Grove owned this stock outright result from the fact that she treated the stock as if it were hers alone. She made outright gifts to her children from time to time, gifts which she obviously could not have made if she possessed merely a life estate in the stock. It should also be noted that the certificates themselves were registered in her sole name and did not indicate that she possessed merely a life estate.

Plaintiffs contend that the administration account is inaccurate and attempt to reconstruct the receipts and payments shown thereon.

The plaintiffs seek to controvert the facts established by the administration account and the other official records of the Register of Wills for Frederick County by tracing funds into and out of the estate bank account which was

opened at the Farmers and Mechanics National Bank in Frederick, Maryland on November 7, 1929 and closed out on October 29, 1930. That the amounts of the checks drawn and the deposits do not correspond precisely with the administration account does not make the latter a nullity. The administration account and the other papers filed with the Register of Wills were all sworn to before the Register of Wills. The account and the order authorizing the sale were approved by the Court. In the absence of evidence more convincing than a bank ledger sheet and some of the checks themselves, showing deposits and withdrawals from the estate bank account, this Court will accept the facts shown by the official papers on file in the Register's office.

Under Maryland law, proceedings of the Orphans' Courts are presumed to be correct, as are acts of executors and administrators. Sykes, Maryland Probate Law & Practice, Section 203, page 214, State v. Talbot, 148 Md. 70, 79 (1925). The propriety of a decision of the Orphans' Court may not be collaterally inquired into in the absence of gross impropriety such as fraud or collusion, none of which has been alleged here.

The Plaintiff attempts to overcome this presumption of correctness which must attach to proceedings of the Orphans' Court by drawing inferences from the record of deposits and withdrawals, such speculation undertaken absence of testimony, or other evidence explaining these deposits and withdrawals, such speculation undertaken some 38 years later does not overcome the presumption of correctness of the papers on file in the Orphans' Court. Clear proof is lacking as to just how the sale of the stock was carried out in all its details. However, the plain fact shown by the administration account is that there was not sufficient cash on hand to pay debts and expenses of the estate unless stocks and bonds were sold. There is nothing in any of the papers to suggest that part of the M. J. Grove Lime Company stock was sold and that part was retained and distributed in kind to the widow. The order authorizing the sale covered all 114 shares owned by the estate, as did the report of sale.

The plaintiffs further contend that it has already been determined by the Circuit Court for Frederick County and by the Court of Appeals of Maryland that the shares of stock of the company were distributed to the widow in kind. In Shank v. Sappington, which I previously referred to at pages 429 and 430, the Court of Appeals of Maryland in stating the facts said the following:

> "Upon completion of administration, the shares of stock in the M. J. Grove Lime Company, appraised at $22,800, and other assets of limited value, were distributed to the widow 'for and during her life or widowhood.' The widow never remarried and before she died some 30 years later, the value of the shares of stock, as the result of stock splits, stock dividends and the acquisition of the Lime Company by the Flintkote Company, had increased to a considerable fortune."

Examination of the pleadings and of the transcript of the proceedings before the lower state court, namely the Circuit Court for Frederick County, shows that the factual issue here was never presented to that Court for decision. The suit in the lower state was filed by R. Francis Sappington, Trustee under the will of Jessie B. Grove against Lillian Grove Shank and Grace Grove Sappington, co-executrices under the will of Jessie B. Grove, seeking a judicial construction of the will of Eugene A. Grove. The case was submitted to the lower court on Bill and Answer. There was apparently one exhibit which was offered, namely the administration account. It was not in fact necessary for a decision in that case to determine whether the widow received stock of the company by distribution from the estate or by way of purchase from the estate. The question in that case was whether the widow under the terms of the will took a life estate in the property of her husband which was in fact distributed to her.

It was alleged in the Bill of Complaint filed in the state court proceeding that $13,876.82 was distributed to Jessie B. Grove by the estate of her husband and that the widow received, in addition to farm implements and furnishings,

the 114 shares of M. J. Grove Lime Company. Such allegations were admitted by the defendants in the state court proceeding (who are the plaintiffs in this action and who had much to gain in agreeing to such facts). It was therefor entirely appropriate for the Circuit Court for Frederick County to state in its memorandum opinion filed September 6, 1966 that the 114 shares of stock were distributed in the final administration account to Jessie B. Grove, as that fact was not disputed in that action. It was further quite correct for the Court of Appeals in the Shank v. Sappington decision to conclude on the basis of the admissions made in the pleadings by the parties that the shares were distributed to the widow. Such finding was not necessary to the decision reached by the lower court and affirmed by the Court of Appeals. Accordingly, such finding is in no way binding or conclusive in the present case where the critical issue whether the widow received the stock by distribution or by way of purchase was actually litigated

In the recent opinion of the Supreme Court in Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, the Supreme Court discussed whether a federal court in a federal tax controversy is bound by a state trial court's adjudication of property rights or characterization of property interest when the United States is not made a party to such proceeding. In holding that where Federal Estate Tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made as to such property interests by a state trial court, the Supreme Court said the following at page 463:

> "First, the Commissioner was not made a party to either of the state proceedings here and neither had the effect of res judicata, Freuler v. Helvering, supra; nor did the principle of collateral estoppel apply."

And a little further on:

> "Next, it must be remembered that it was a federal taxing statute that the Congress enacted and upon which we are here passing. Therefore, in construing

it, we must look to the legislative history surrounding it. We find that the report of the Senate Finance Committee recommending enactment of the marital deduction used very guarded language in referring to the very question involved here. It said that 'proper regard', not finality, 'should be given to interpretations of the will' by state courts and that only when entered by a court 'in a bona fide adversary proceeding'."

In the present case, there was not even a factual determination by the lower court. The crucial fact was admitted in the pleadings by parties who had much to gain from such admissions. No testimony was taken in that case as previously noted. It was submitted on Bill and Answer.

In the recent case of Lakewood Plantation, Inc. v. United States, which was decided in the District Court in South Carolina on September the 5th, 1967, reported at 67-2 U.S.T.C., paragraph 9731, the District Court found that the result of the state court proceedings was jointly sought by all of the parties and that the taxpayer could not rely upon the state court factual determination in seeking to establish its right to recover in the District Court. The Court stated in that case:

"The present matter therefore resolves itself into this issue: If the Government in accordance with *Bank of New Haven* and *Bosch* (*Bank of New Haven v. The United States* is also reported at 387 U.S. 456, being a companion case to *Bosch*, which was decided at the same time), is not bound by a state trial court decree of property rights based on a misapplication of state law, is it bound by such a decree based on erroneous findings of fact? This court takes the view that the state decree herein has no binding force on the Government, without considering the question of whether it was collusive or non-collusive. If a state court decree is not binding on the Government on erroneous findings of state law the resultant logic of the *Bank of New Haven* and the *Bosch* decisions is that by a like token the Government is not bound by a decree based

upon erroneous findings of fact. The mandate of *Bank of New Haven* and *Bosch* appears to be that federal tax liability should be litigated exclusively in the federal courts with proper regard to state law when property rights are disputed."

This Court, therefore, for the reasons stated, finds that in 1930 Jessie B. Grove purchased 114 shares of M. J. Grove Lime Company stock from her husband's estate and that as a result of such purchase she owned such shares outright and in fee after the administration of the estate was concluded. The numerous shares of Flintkote Company stock which devolved from that original holding were therefore clearly a part of her estate at the time of her death and the Government correctly collected estate taxes from her as a result of the inclusion of such assets in her gross estate. In view of the Court's conclusion in this connection it is not necessary to decide the alternative question presented to the Court involving a tracing of the original 114 shares. Counsel will prepare and submit an appropriate order dismissing the complaint with costs.

Mr. Schuldinger, if you will prepare that order and submit it to Mr. Blanton for approval as to form.

(Thereupon, at 1:17 p.m., the aforecaptioned proceedings were concluded.)

(R. 69) JUDGMENT

(Filed May 2, 1968)

The Court having considered the stipulation of the parties; the exhibits offered in evidence; the testimony at the trial of this matter; and the arguments of counsel, and having entered its findings of fact and conclusions of law herein, it is in conformity therewith.

ORDERED, that the Complaint be dismissed with prejudice, and that the defendant have judgment on its counter-

claim in the amount of $8,162.72, together with interest according to law, plaintiffs to bear all costs.

Done this 2nd day of May, 1968.

ALEXANDER HARVEY, II,
United States District Judge.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 12,549

Grace Grove Sappington and Lillian Grove Shank, individually and as co-Executrices u/w of Jessie B. Grove,
Appellants,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the District of Maryland,
Alexander Harvey, II, District Judge.

(Argued December 4, 1968 Decided March 3, 1969)

Before SOBELOFF, BOREMAN and WINTER, Circuit Judges.

WINTER, Circuit Judge:

From a judgment denying the refund of federal estate taxes, plaintiffs, executrices of the estate of Jessie B. Grove, appeal. On April 8, 1962, the date of death, decedent was possessed of certain shares of preferred stock of The Flint-

kote Company. The principal question on appeal is whether the evidence adduced at trial supports the district judge's ultimate finding that decedent acquired the stock as purchaser from the estate of her late husband, who had died in 1929, so that she owned it in fee and it was includable in her gross estate for federal estate tax purposes, rather than, as plaintiffs contended, acquired the stock as life tenant under her husband's will with the tax result that the stock was transmitted at her death to the remaindermen without inclusion in her gross estate. Plaintiffs also question the correctness of an interlocutory ruling of the district judge, refusing plaintiffs leave to file an amended complaint. We affirm.

I.

Decedent's late husband owned 114 shares of the common stock of The M. J. Grove Lime Company, which, as a result of acquisition of that company by Flintkote, stock splits and stock dividends, and after gifts of Flintkote stock by decedent, evolved into 7,684 shares of preferred stock of Flintkote standing in the name of decedent and her two surviving daughters, as joint tenants, on the date of her death.* Decedent's late husband died leaving a concise, informal will which has been judicially construed to vest his entire estate in decedent, as life tenant, with remainder, vesting at the date of his death, to his children, share and share alike. *Shanks v. Sappington*, 247 Md. 427, 231 A. 2d 712 (1967).

On the crucial question of whether decedent took under this will or otherwise, the principal proof, on which the district judge relied, was the records of the Orphans' Court for Frederick County, Maryland, in which the husband's

* Decedent's original stock certificates were registered in her name alone, purportedly as sole owner in fee. Subsequently, to effect gifts to her four daughters, she had the certificates reissued in her name and that of various daughters as joint tenants. Upon the death of two of her daughters she made complete disposition of some shares. Those remaining at her death were registered in her name and that of either of her two surviving daughters as joint tenants.

estate was administered. Those records, sworn to by the decedent, showed that the husband's total assets subject to administration amounted to $28,371.30, of which at most only a small portion was cash, and debts and expenses amounted to $14,494.48, leaving $13,876.82 for distribution to decedent. The common stock of Grove was valued in the estate at $22,800.00. The records also reflected an order of the court authorizing the sale of the stock to decedent, a report of sale by her as executrix of her husband's estate showing that the stock had been sold to her individually and an administration account indicating that cash, and not stock, and tangible personal property in kind was distributed to her in the closing of the estate. There was proof that, whether as single or joint owner of shares, the certificates for stock were always registered in her name as owner (single or joint) and not as life tenant.

The counterproof was records of a bank showing deposits and withdrawals of the estate bank account of the husband during the period of administration of his estate. The lack of correlation between the transactions in the account and the records of the Orphans' Court was relied on to show that the sale of the stock to decedent and distribution to her of cash were only purported transactions designed to effect transfer of the stock to her, as life tenant, under her husband's will, and not by actual sale to vest in her a fee interest. Proof was presented to show decedent's apparent financial inability to have purchased the stock. Plaintiffs also showed certain discrepancies in the records of the Orphans' Court indicating that various papers were not executed or were not filed on the dates purportedly executed or filed as shown on their face.

Having due regard to the presumption of correctness which attaches to official records, we cannot say that the district judge's ultimate finding was clearly erroneous. True, there are minor discrepancies in the records of the Orphans' Court, a fact not unusual in a court in a predominantly rural area presided over by laymen, but they are not of such nature or magnitude as to constitute substantial impeachment of what they purport to reflect. Nor can we say that the probative value of the counterproof

is so overwhelming that the district judge's findings should be set aside. If in fact decedent purchased the stock, it would not be unusual, so long as all creditors were paid, for the full cash price not to have passed from her to the estate since she would recover a major portion thereof as distributee thereunder.

II.

Plaintiffs' complaint seeking a refund of taxes proceeded upon the theory advanced before the Commissioner, that decedent was simply a life tenant of the stock she had obtained from her husband, and that this stock was not includable in her gross estate under 26 U.S.C.A. § 2033. Subsequent to the filing of the complaint, the decision of the Maryland Court of Appeals in *Shank v. Sappington, supra,* was announced. In addition to holding that decedent took as life tenant under her husband's will, the Court also held that decedent had received, upon the death of two children who predeceased her, full ownership of a portion of the stock, because she had inherited by intestacy of the children their vested remainder interests. Thereafter, plaintiffs sought to amend the complaint to allege that as a result of that decision and further investigation on their part, decedent had made certain gifts to her surviving children prior to her death and that these gifts were not made in contemplation of death and, hence, were not includable in her gross estate under 26 U.S.C.A. § 2035. The amendment was sought to be made after the expiration of the time that it might have been asserted as a basis for a claim for refund filed with the Commissioner.

We perceive no error in the district judge's refusing leave to amend. Plaintiffs sought to assert a new and different theory of refund, one never presented to the tax authorities at the administrative stage of consideration of a refund and, hence, one which the taxing authorities had no occasion to investigate and consider.

The Internal Revenue Code of 1954 requires a timely claim for refund before suit for refund will lie. 26 U.S.C.A. §§ 6532(a), 7422(a). And the Treasury Regulations on

Procedure and Administration require the claim to be complete and specific. 26 C.F.R. § 301.6402-2(b). Failure to comply strictly with the statute and the regulation bars recovery. *Nemours Corp. v. United States*, 188 F. 2d 745, 750 (3 Cir.), *cert. den.*, 342 U.S. 834 (1951). A claim seeking refund upon one asserted fact situation may not be amended out of time so as to require an investigation of matters not germane to the original claim. *United States v. Garbutt Oil Co.*, 302 U.S. 528 (1938); *United States v. Hancock Bank*, 400 F. 2d 975, 980 (5 Cir. 1968). While an amendment which only makes more definitive matters already within the Commissioner's knowledge is permissible, the fact of specification of the original claim tends to confine the administrative investigation to that issue. *United States v. Andrews*, 302 U.S. 517, 525 (1938). As recently held, the propriety of refusing an amendment does not depend upon a showing that the government has been misled to its prejudice. *United States v. Hancock Bank, supra*, at 981.

Since the legal and factual bases of plaintiffs' amendment were foreign to their original claim, the district judge was correct in his ruling.

Affirmed.

JUDGMENT

(Filed March 3, 1969)

No. 12,549

Appeal from the United States District Court
for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

SAMUEL W. PHILLIPS,
Clerk.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 12,549

Grace Grove Sappington and Lillian Grove Shank,
individually and as co-Executrices
u/w of Jessie B. Grove,
Appellants,

versus

United States of America,
Appellee.

Appeal from the United States District Court
for the District of Maryland,
Alexander Harvey, II, District Judge.

Before SOBELOFF, BOREMAN and WINTER, Circuit Judges.

ON PETITION FOR REHEARING

(Filed April 15, 1969)

PER CURIAM:

In their petition for rehearing, in which plaintiffs suggest a rehearing en banc, plaintiffs properly call to our attention the twice-repeated misstatement that decedent

was the sole owner of the Flintkote stock at the date of her death. The fact is that she was joint owner with her daughters after having initially acquired the predecessor stock purportedly as sole absolute owner. We have corrected the factual recitations of our previous opinion in this regard, but the factual difference indicates no difference in result. Whether as sole owner or joint owner, the significant fact is that decedent was never described as merely a life tenant and her actions, after initial acquisition of the stock, were inconsistent with her having the limited estate that plaintiffs assert.

The legal arguments advanced in the petition for rehearing are substantially those advanced in the initial appeal. We notice only one. Much stress is placed upon *Gavin, Trustee v. Carling*, 55 Md. 530 (1880), which, it is argued, established the rule in Maryland that a probate court has no power to authorize an executrix to purchase property from the estate she is administering. Even if an executor's purchase is voidable, the short answer is that no Maryland case has ever declared such a sale invalid if, as here, not complained of for almost forty years.

The petition for rehearing is

Denied.